Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

MAXANN C. FINK,

Petitioner

v.

JO ANN B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY

Respondent

c/w

IDA J. ROCHESTER,

Petitioner

v.

JO ANN B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY

Respondent

On Petition For Writ of Certiorari
To the Fifth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that, in Social Security Disability claims, failure of the Social Security Administration to comply with 20 C.F.R. 404.1527(d)(2) and implementing regulations, which require that the Commissioner "make every reasonable effort to obtain from the individual's treating physician...all medical evidence, including diagnostic tests, necessary in order to properly make such determination," constitutes harmless error.

2. Whether the court of appeals erred in holding that this obligation can be shifted to Social Security Disability claimants.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below:

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix J to the petition and has been designated as unpublished, but may be found at 123 Fed.Appx. 146, 2005 WL 196726 (5th Dir.(LA)).

JURISDICTION

The date on which the United States Court of Appeals decided our case was January 31, 2005.

A timely petition for rehearing *en banc* was denied by the United States Court of Appeals on the following date: April 6, 2005, and a copy of the order denying rehearing appears at Appendix K.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 USC 423(d)(5)(B)

(B) In making any determination with respect to whether an individual is under a disability or continues to be under a disability, the Commissioner of Social Security shall consider all evidence available in such individual's case record, and shall develop a complete medical history of at least the preceding twelve months for any case in which a determination is made that the individual is not under a disability. In making any determination the Commissioner of Social Security shall make every reasonable effort to obtain from the individual's treating physician (or other treating health care provider) all medical evidence, including diagnostic tests, necessary in order to properly make such determination, prior to evaluating medical evidence obtained from any other source on a consultative basis.

STATEMENT OF THE CASE

Petitioner Maxann Fink filed an application for disability insurance benefits on July 22, 1998, alleging disability since June 30, 1986. She was denied initially and on reconsideration and had a hearing before an Administrative Law Judge, who issued a decision on September 25, 2000. That decision rejected the findings of the treating physicians in favor of the findings of a non-treating consultant and denied Petitioner benefits, stating that there was other work Petitioner could perform, so that she was not disabled. Petitioner requested review by the Appeals Council, but the decision was affirmed on June 7, 2002. Petitioner then appealed to the United States District Court, where the matter was referred to a Magistrate. The Magistrate, on August 11, 2003, recommended that there be judgment denying plaintiff's motion for summary judgment and granting defendant's motion for summary judgment. Plaintiff then filed an objection to the Magistrate's report and recommendation and a motion to stay proceedings, both of which were denied. Plaintiff then appealed to the Fifth Circuit Court of Appeals.

Petitioner Ida Rochester filed an application for disability insurance benefits on June 23, 1998, alleging disability since November 1, 1997. She was denied initially and on reconsideration and had a hearing before Administrative Law Judge E. Wilson Crump, II, who issued a decision on August 23, 2000. That decision rejected the findings of the treating physicians in favor of the findings of a non-treating consultant and denied petitioner benefits, stating that, as there was a substantial number of jobs petitioner could perform, she was not disabled. Petitioner requested review by the Appeals Council, but the decision was affirmed on October 17, 2002. Petitioner then appealed to the United States District Court. The Court below referred the matter to a Magistrate, who recommended that plaintiff's complaint be dismissed. Plaintiff

objected to the magistrate's report and recommendation, but the court accepted the findings and recommendation of the magistrate. Plaintiff Rochester then appealed to the Fifth Circuit Court of Appeals.

The two cases were consolidated, and, on January 31, 2005, the Fifth Circuit panel affirmed the decisions of the lower courts. Plaintiffs requested *en banc* rehearing, but that request was denied on April 6, 2005.

The basis for federal jurisdiction in the courts of first instance was 42 U.S.C. §401, *et. seq.*

For simplicity, petitioners will concisely state that the findings of their treating physicians, if accepted by respondent, would have resulted in a finding of disability for each. Instead, respondent sent petitioners to consultative examinations without soliciting the treating physicians to perform them, accepted the findings of a single non-treating examiner, and rejected the findings of both treating physicians in Fink and both treating psychiatrists (and a consulting psychiatrist) in Rochester without recontacting the treating physicians to attempt to resolve perceived inconsistencies or addressing the factors of 20 C.F.R. 404.1527(d)(2).

REASONS FOR GRANTING THE PETITION

Two years ago, in *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003), this Court compared the "treating physician rule" in ERISA cases to that of a portion (20 C.F.R. 404.1527) of the "treating physician rule" in Social Security disability cases. But 20 C.F.R. 404.1527 is but one of several regulations[1] implementing 42 USC 423(d)(5)(B), which was

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[1] 20 CFR 404.1500 *et. seq.* and 20 CFR 416.900 *et. seq.* For facility, only those regulations regarding Title II benefits, 20 CFR 404.1500 *et. seq.* will be addressed, though those regulations addressing Title XVI (SSI) are identical.

added to the Social Security Act as part of the Social Security Disability Benefits Reform Act of 1984[2],. These regulations, and 42 USC 423(d)(5)(B), have not yet been addressed by this Court, and there exists a division between the circuits regarding the enforcement of some.

In practice, 42 USC 423(d)(5)(B) and the regulations are uniformly ignored by the Social Security Administration (SSA) unless and until remedied by the Appeals Council on a case by case basis. For example, 42 USC 423(d)(5)(B) provides, in pertinent part:

> In making any determination the Commissioner of Social Security shall make every reasonable effort to obtain from the individual's treating physician (or other treating health care provider) all medical evidence, including diagnostic tests, necessary in order to properly make such determination, prior to evaluating medical evidence obtained from any other source on a consultative basis.

Accordingly, pursuant to instructions by the Second Circuit, 20 C.F.R. 404.1519h was enacted to provide:

> When in our judgment your treating physician or psychologist is qualified, equipped, and willing to perform the additional examination or tests for the fee schedule payment, and generally furnishes complete and timely reports, your treating physician or psychologist will be the preferred source to do the purchased examination. Even if only a supplemental test is required, your treating physician or psychologist is ordinarily the preferred source.

But, in practice, petitioner urges that the treating physician is effectively solicited to perform the consultative examination in fewer than 5% of the cases. The number might very well be fewer than 1%, and counsel for petitioners

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[2] Pub. L. No. 98-460, 98 Stat. 1794 (1984)